

The respondent requests review of whether the claimant suffered an accidental injury arising out of and in the course of employment. Respondent argues the claimant's condition is related to a systemic disorder diagnosed by Dr. Nowlin which was neither caused nor aggravated by claimant's employment. Therefore respondent argues that claimant's condition is not work related and the ALJ's Order should be reversed.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant began working as a carpenter doing commercial work for respondent on December 1, 2003. Claimant used vibratory tools such as the screw gun, electric chipper and a saw. He began noticing some numbness and discoloration in his hands on Thursday and Friday. The weather was cold that week. He went home from work and took a warm shower which removed most of the discoloration.

On Monday, December 8, 2003, the claimant used the electric chipper all day. He testified that the weather was a little warmer to the point that he was able to take off his coveralls and wear just his light jacket. Claimant continued to work with his gloves on because his hands were cold. Claimant was asked by his supervisor, Paul Stueve, as to why he still needed the gloves on such a nice day. Claimant's supervisor checked claimant's hands and noted there was slight discoloration in the index fingers of both hands. Claimant finished working on Monday, didn't work on Tuesday due to the weather and then on Wednesday, December 10, 2003, claimant worked a few hours and his supervisor took him to Dr. Fitzgerald for medical treatment for his hands. Claimant's last day worked was December 10, 2003.

Claimant was seen by Dr. Fitzgerald on eight different occasions. The doctor examined the claimant's hands, prescribed some medication and took the claimant off work until February 26, 2004. The discoloration in claimant's hands resolved while he was off work. After being released to return to work, the claimant went back to Francis Construction and was advised that there was no work available and that his position had been filled.

At respondent's request, the claimant was seen by Dr. Nowlin on one occasion for approximately 30 minutes. Dr. Nowlin indicated that claimant had cyanosis in both his hands and feet. Dr. Nowlin noted that if there was a return to normal color the diagnosis would be Raynaud's phenomenon. But because that did not occur during her examination of claimant, the doctor diagnosed claimant with macrocytic anemia. And Dr. Nowlin opined the cyanosis and anemia was due to a systemic disorder and the condition was neither caused nor aggravated by claimant's work activities.

The claimant testified that his previous work history was construction and he used some of the same vibratory tools in those jobs as he did for the respondent. Claimant did not experience any problems with his hands while working for previous employers. Furthermore, claimant had even worked in more extreme weather conditions.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.¹ "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."²

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁴

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁵

Dr. Fitzgerald diagnosed claimant with Raynaud's disease which was aggravated by his work. Dr. Fitzgerald noted:

Initial evaluation of Fred's [claimant's] hands showed that all fingers were blue, pale and cold, and discolored. Fred had been working hanging sheetrock at Harrah's with a screw gun. He reports that he uses the screw gun equally with both hands during his workday. I immediately stopped him from further use of his hands as this repetitive trauma has impaired his circulation. I have been doing weekly follow-ups and I have started him on Diltiazem, which is a medicine that dilates blood vessels to try to improve the circulation to his hands. I also consulted Dr. Marc Baraban a local plastic surgeon about Fred's condition and we agreed that Fred has an odd condition called Raynaud's phenomenon, which is directly related to repeated impact to his palm and fingers from the screw gun and hanging sheet rock. . . .⁶

The ALJ concluded that Dr. Fitzgerald's diagnosis was more persuasive. The ALJ noted that because the discoloration in claimant's hands had returned to normal, Dr.

¹ K.S.A. 44-501(a) (Furse 2000); see also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

² K.S.A. 2003 Supp. 44-508(g).

³ *Brobst v. Brighton Place North*, 24 Kan. App.2d 766,771, 955 P.2d 1315 (1997).

⁴ *Springston v. IML Freight, Inc.*, 10 Kan. App.2d 501, 704 P.2d 394, rev. denied 238 Kan. 878 (1985).

⁵ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App.2d 334, 678 P.2d 178 (1984).

⁶ P.H. Trans., Cl. Ex. 1.

Nowlin's comments regarding Raynaud's phenomenon would appear more applicable to this claim than her final diagnosis. The Board agrees and affirms the ALJ's finding that claimant has met his burden of proof to establish that he suffered a work-related accident.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.⁷

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated March 23, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2004.

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Nathan Burghart, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁷ K.S.A. 44-534a(a)(2) (Furse 2000).